

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HERMAN D. COLLINS,)	
)	No. CV-10-00004-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 19.) Attorney Maureen J. Rosette represents Herman Collins (Plaintiff); Special Assistant United States Attorney Franco L. Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on January 26, 2007. (Tr. 121.) He alleged disability due to depression, Type II diabetes, arthritis, bursitis, neuropathy, heart issues, gout, stomach problems, and high blood pressure. (Tr. 125.) He alleged

1 an onset date of January 7, 2007. (*Id.*) Benefits were denied
2 initially and on reconsideration. Plaintiff timely requested a
3 hearing before an administrative law judge (ALJ), which was held
4 before ALJ R. S. Chester on October 22, 2008. (Tr. 23-57.)
5 Plaintiff, who was represented by counsel, and vocational expert K.
6 Diane Kramer (VE) testified. The ALJ denied benefits on November
7 28, 2008, and the Appeals Council denied review. (Tr. 1-5, 12-22.)
8 The instant matter is before this court pursuant to 42 U.S.C. §
9 405(g).

10 STANDARD OF REVIEW

11 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
12 court set out the standard of review:

13 A district court's order upholding the Commissioner's
14 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
15 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
16 Commissioner may be reversed only if it is not supported
17 by substantial evidence or if it is based on legal error.
18 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
19 Substantial evidence is defined as being more than a mere
20 scintilla, but less than a preponderance. *Id.* at 1098.
21 Put another way, substantial evidence is such relevant
22 evidence as a reasonable mind might accept as adequate to
23 support a conclusion. *Richardson v. Perales*, 402 U.S.
24 389, 401 (1971). If the evidence is susceptible to more
25 than one rational interpretation, the court may not
26 substitute its judgment for that of the Commissioner.
27 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
28 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,
resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence

1 supports more than one rational interpretation, the court may not
2 substitute its judgment for that of the Commissioner. *Tackett*, 180
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
4 Nevertheless, a decision supported by substantial evidence will
5 still be set aside if the proper legal standards were not applied in
6 weighing the evidence and making the decision. *Browner v. Secretary*
7 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
8 there is substantial evidence to support the administrative
9 findings, or if there is conflicting evidence that will support a
10 finding of either disability or non-disability, the finding of the
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
12 1230 (9th Cir. 1987).

13 SEQUENTIAL EVALUATION

14 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
15 requirements necessary to establish disability:

16 Under the Social Security Act, individuals who are
17 "under a disability" are eligible to receive benefits. 42
18 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
19 medically determinable physical or mental impairment"
20 which prevents one from engaging "in any substantial
21 gainful activity" and is expected to result in death or
22 last "for a continuous period of not less than 12 months."
23 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
24 from "anatomical, physiological, or psychological
25 abnormalities which are demonstrable by medically
26 acceptable clinical and laboratory diagnostic techniques."
27 42 U.S.C. § 423(d)(3). The Act also provides that a
28 claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only
unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
inquiry addressing both components of the definition,

1 until a question is answered affirmatively or negatively
2 in such a way that an ultimate determination can be made.
3 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
4 claimant bears the burden of proving that [s]he is
5 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
6 1999). This requires the presentation of "complete and
7 detailed objective medical reports of h[is] condition from
8 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
9 404.1512(a)-(b), 404.1513(d)).

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled. 20
12 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
13 137, 140-42 (1987). In steps one through four, the burden of proof
14 rests upon the claimant to establish a prima facie case of
15 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
16 920, 921 (9th Cir. 1971). This burden is met once a claimant
17 establishes that a physical or mental impairment prevents him from
18 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
19 416.920(a). If a claimant cannot do his past relevant work, the ALJ
20 proceeds to step five, and the burden shifts to the Commissioner to
21 show that (1) the claimant can make an adjustment to other work; and
22 (2) specific jobs exist in the national economy which claimant can
23 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
24 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

25 STATEMENT OF THE CASE

26 The facts of the case are set forth in detail in the transcript
27 of proceedings and are briefly summarized here. At the time of the
28 hearing, Plaintiff was 55 years old, married, and living in a mobile
home with his spouse and father-in-law. (Tr. 31.) Plaintiff had a
high school education and one and a half years of community college.
(Tr. 33.) He had served in the Navy, but was released on an

1 administrative discharge. (Tr. 35.) Plaintiff had past work
2 experience in the automobile sales business as a car salesman and
3 car lot porter. He stated he had had more than fifty jobs in auto
4 sales. (Tr. 47, 52.) He testified he stopped working because he
5 had to elevate his feet six times a day, he suffered sore joints in
6 his knees, shoulders, back and hips, and was impaired by depression
7 and mood swings. (Tr. 36, 45-46.) He also stated he was
8 hospitalized at the Veteran's Administration for depression in
9 January 2007. (Tr. 49.) He testified his medication side effects
10 made it difficult to work. (Tr. 35-36.) Regarding work related
11 activities, Plaintiff reported his depression prevented him from
12 being in public, he only could walk for ten minutes, stand for ten
13 to fifteen minutes, sit for ten to fifteen minutes, and carry no
14 more than two twelve packs of pop reportedly due to his physical
15 impairments. (Tr. 41-44.)

16 ADMINISTRATIVE DECISION

17 At step one, ALJ Chester found Plaintiff had not engaged in
18 substantial gainful activity since January 7, 2007. (Tr. 14.) At
19 step two, he found Plaintiff had severe impairments of "major
20 depressive disorder; bursitis; degenerative disc disease, lumbar
21 spine; morbid obesity; and chronic obstructive pulmonary disease
22 (COPD)." (*Id.*) He found reported left knee problems were not
23 severe. (Tr. 16.) At step three, ALJ Chester found Plaintiff's
24 impairments, alone and in combination, did not meet or medically
25 equal one of the listed impairments in 20 C.F.R., Appendix 1,
26 Subpart P, Regulations No. 4 (Listings). (Tr. 17.) At step four,
27 the ALJ determined Plaintiff had the residual functional capacity
28

1 (RFC) to perform medium work with these specific limitations:

2 -lift and carry up to 20 pounds frequently and up to 50 pounds
3 occasionally;

4 -sit for two hours at one time up to a total of four hours in
5 an 8-hour day;

6 -stand and walk for two hours at one time up to a total of 4
7 hours in an 8 hour day;

8 -avoid overhead reaching, climbing ladders or scaffolds,
9 crouching, and working around unprotected heights and moving
10 mechanical parts.

11 -occasional climbing stairs and ramps, balancing, stooping,
12 kneeling, crawling, and operating a motor vehicle. (Tr. 18.)

13 In his step four findings, ALJ Chester summarized the medical
14 evidence, third party testimony, and Plaintiff's testimony, made
15 credibility findings, and concluded Plaintiff's statements regarding
16 the severity of his functional limitations were not credible to the
17 extent they were inconsistent with the RFC findings. (Tr. 18-21.)

18 Based on the RFC, Plaintiff's credible testimony, and VE testimony,
19 the ALJ concluded Plaintiff could perform his past work as a
20 automobile salesman and used car lot porter. (Tr. 21-22.) The ALJ
21 found Plaintiff was not disabled, as defined by the Social Security
22 Act, from the alleged onset date through the date of his decision.

23 (Tr. 22.)

24 ISSUES

25 The question is whether the ALJ's decision is supported by
26 substantial evidence and free of legal error. Plaintiff argues the
27 ALJ erred in his: (1) credibility findings; (2) evaluation of

1 medical source opinions; and (3) step four determination. (Ct. Rec.
2 14 at 9-18.)

3 DISCUSSION

4 A. Credibility Findings

5 Plaintiff contends the ALJ failed to properly discredit his
6 symptom testimony. (Ct. Rec. 14 at 14.) When the ALJ finds a
7 claimant's statements as to the severity of impairments, pain, and
8 functional limitations are not credible, the ALJ must make a
9 credibility determination with findings sufficiently specific to
10 permit the court to conclude the ALJ did not arbitrarily discredit
11 claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947, 958-959
12 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir.
13 1991) (en banc).

14 If there is no affirmative evidence that the claimant is
15 malingering, the ALJ must provide "clear and convincing" reasons for
16 rejecting the claimant's symptom testimony. *Reddick v. Chater*, 157
17 F.3d 715, 722 (9th Cir. 1998). The ALJ engages in a two-step
18 analysis in deciding whether to admit a claimant's subjective
19 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36
20 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).
21 Under the first step, the ALJ must find the claimant has produced
22 objective medical evidence of an underlying "impairment," and that
23 the impairment, or combination of impairments, could reasonably be
24 expected to cause "some degree of the symptom." *Lingenfelter*, 504
25 F.3d at 1036.

26 Once the first test is met, the ALJ then evaluates the
27 credibility of the claimant and makes specific findings supported by
28

1 "clear and convincing" reasons. (*Id.*) In addition to ordinary
2 techniques of credibility evaluation, the ALJ may consider the
3 following factors when weighing the claimant's credibility: the
4 claimant's reputation for truthfulness; inconsistencies either in
5 his allegations of limitations or between his statements and
6 conduct; daily activities and work record; and testimony from
7 physicians and third parties concerning the nature, severity, and
8 effect of the alleged symptoms. *Light v. Social Sec. Admin.*, 119
9 F.3d 789, 792 (9th Cir. 1997); *Fair v. Bowen*, 885 F.2d 597 n.5 (9th
10 Cir. 1989). Although an adjudicator may not reject a claimant's
11 extreme symptom complaints solely on a lack of objective medical
12 evidence to support the degree of severity alleged, medical evidence
13 is a relevant factor to consider. *Social Security Ruling (SSR) 96-*
14 *7p.*¹

15 Plaintiff argues the ALJ failed to give "clear and cogent"
16 reasons for rejecting his statement that he needed to elevate his
17 legs six times a day. (Ct. Rec. 14 at 15-16; Tr. 46.) However, *de*
18 *novo* review of record and the ALJ's findings show that ALJ Chester
19 (1) specifically noted Plaintiff's testimony that he needs to
20 elevate his feet six times a day because they start to swell; and
21 (2) gave specific "clear and convincing" reasons supported by the

22
23 ¹ Social Security Rulings are issued to clarify the Regulations
24 and policy. They are not published in the federal register and do
25 not have the force of law. However, under the case law, deference
26 is to be given to the Commissioner's interpretation of the
27 Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005);
28 *Bunnell*, 947 F.2d at 346 n.3.

1 record for discounting the intensity and limitations alleged in this
2 testimony. (Tr. 19, 20.) For example, the ALJ found no medical
3 evidence from treating sources at the Veteran's Administration
4 medical clinic (VA) indicating concern regarding excessive swelling,
5 restrictions on Plaintiff's activities due to swelling of his feet,
6 or the need to elevate his legs.² (Tr. 15, 19.) These findings are
7 supported by records from consulting neurologist, Kathleen Meyer,
8 M.D., who examined Plaintiff on May 19, 2008, and Robert Rose, M.D.,
9 who examined Plaintiff on August 11, 2008. (Tr. 15, 511-13, 514-
10 25.)

11 Plaintiff presented to Dr. Meyer complaining of back pain, and
12 reported swelling of his feet and ankles in his systems review form.
13 (Tr. 511.) On examination, Dr. Meyer noted normal sensation in all
14 four extremities, normal strength and tone in his arms and legs with
15 no atrophy, and no radicular component to his symptoms or
16 examination. (Tr. 512.) She opined his condition did not warrant

17 ² Independent review of the record indicates Plaintiff was
18 diagnosed with gout in January 2006. He was advised to change his
19 diet, take his medication, and keep his feet elevated for 20 minutes
20 if swelling became acute. (Tr. 363.) By June 2006, the medical
21 records indicate Plaintiff had lost weight, his gout was controlled,
22 and diabetes control was improving. (Tr. 355.) These records
23 predate Plaintiff's alleged onset date of January 2, 2007. Evidence
24 that predates the alleged period of disability is of limited
25 relevance. *Carmickle v. Astrue*, 533 F.3d 1155, 1165 (9th Cir. 2008).
26 Treating source records after March 2007 do not reflect the severity
27 noted in 2006. (See, e.g., Tr. 391-923.)
28

1 surgery, but recommended injections and aquatic therapy. (*Id.*)

2 Plaintiff presented to Dr. Rose for an evaluation of back pain.

3 (Tr. 514.) Dr. Rose found evidence of degenerative arthrosis in the
4 lumbosacral spine, without evidence of neuropathy or radiculopathy.

5 (Tr. 516.) However, he noted "diffuse peripheral neuropathy
6 affecting bilateral feet." (Tr. 516.) He concluded Plaintiff was

7 capable of standing for two hours at one time without interruption

8 for two hours in an eight-hour work day, walking for two hours at

9 one time without interruption for two hours in an eight-hour work

10 day, and sitting for four hours at one time without interruption,

11 for four hours in an eight-hour day. (Tr. 520.) Plaintiff was also

12 capable of frequently operating foot controls. (Tr. 520, 521.)

13 Neither examining physician opined Plaintiff's condition required

14 elevation of his feet six times a day or suggested his foot

15 condition would prevent him from working. This medical evidence

16 supports the ALJ's rejection of Plaintiff's allegation regarding the

17 need to elevate his feet six times a day. (Tr. 20; see Tr. 391-923.)

18 In addition, the ALJ referenced other evidence. For example,

19 he noted inconsistencies between Plaintiff's testimony and

20 statements made to treatment providers. As found by the ALJ,

21 Plaintiff reported to providers that he had left his job in auto

22 sales because of traffic tickets and stress, not because of alleged

23 impairment symptoms as testified. (Tr. 20, 263, 289.) The ALJ

24 also referenced reports from medical providers that contradicted

25 Plaintiff's complaints of intense pain and depression; the effective

26 control of anxiety and depression symptoms with medication; and

27 daily activities inconsistent with total disability. (Tr. 19.)

1 These are "clear and convincing" reasons to discount Plaintiff's
2 testimony. *Thomas*, 278 F.3d at 958-959.

3 As explained by the Commissioner in his policy ruling, the ALJ
4 need not totally reject a claimant's statements. *SSR* 96-7p. ALJ
5 Chester properly found Plaintiff's statements to be credible to a
6 certain degree, but discounted allegations of total disability based
7 on a review and interpretation of evidence in the record as a whole.
8 *Tackett*, 180 F.3d at 1097-98. As stated by the ALJ, pain complaints
9 which are supported by the record were factored into the final RFC
10 determination. (Tr. 20.) The ALJ did not err in his credibility
11 findings. Because his findings are supported by substantial
12 evidence, the Commissioner's credibility determination is affirmed.

13 **B. Evaluation of Medical Evidence**

14 Plaintiff argues the ALJ did not give legally sufficient
15 reasons for rejecting "marked" limitation findings noted by
16 examining psychologist, Dennis Pollack, Ph.D., in his Medical Source
17 Statement. (Ct. Rec. 14 at 16; Tr. 565.) Dr. Pollack evaluated
18 Plaintiff on October 10, 2008, based on results from several
19 psychological tests, a review of past records, and an interview
20 based on Plaintiff's self-report. (Tr. 558-67.)

21 The ALJ summarized Dr. Pollack's evaluation and specifically
22 gave little weight to his "report and opinion of [two] marked
23 limitations in performing activities within a schedule, maintain
24 regular attendance, be punctual within customary tolerances, [and]
25 complete a normal workday and workweek and perform at a consistent
26 pace without an unreasonable number and length of rest periods."
27 (Tr. 20, 565.)

1 In rejecting the "marked" ratings, the ALJ reasoned the
2 evaluation was obtained by Plaintiff's attorney as evidence for the
3 appeal, was based primarily on Plaintiff's unreliable self-report,
4 and was not supported by other evidence in the record. (Tr. 16,
5 20.) Although the purpose for which a medical opinion is sought is,
6 by itself, not a "specific, legitimate reason" for rejecting an
7 medical source opinion, it may be a permissible consideration in the
8 ALJ's analysis "under certain circumstances." *Nguyen v. Chater*, 100
9 F.3d 1462, 1464 (9th Cir. 1996) (*citing Burkhardt v. Bowen*, 856 F.2d
10 1335, 1339 (9th Cir. 1988) (treating physician's letter solicited by
11 claimant's attorney legitimately rejected as unsupported by test
12 results, explanation, or other evidence in the record)).

13 Here, ALJ specifically addressed his concerns regarding the
14 context in which the examination was conducted, but did not rely on
15 this reason for discounting the marked limitations assessed by Dr.
16 Pollack. Rather, he referenced Plaintiff's lack of credibility and
17 lack of other medical evidence in the record to support the severity
18 rating. (Tr. 20.) These are legally sufficient reasons to reject
19 the contradicted functional limitations.³ *Tommasetti*, 533 F.3d at
20 1041; *see also Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989)
21 (reviewing court can read the adjudicator's summary of the evidence
22 and draw inferences). De novo review shows that the ALJ's reasoning

23
24 ³ Dr. Pollack's "marked" limitations are contradicted by
25 limitations assessed by examining psychologist Frank Rosekrans,
26 Ph.D., in February 2007. Contradicted medical source opinions may
27 be rejected by the ALJ with specific and legitimate reasons.
28 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).

1 is supported by substantial evidence in the record.

2 The medical evidence includes an evaluation by agency
3 psychologist James Bailey, Ph.D., who reviewed Plaintiff's records
4 in March 2007 and concluded Plaintiff had no marked limitations in
5 his mental functioning categories. (Tr. 416-17.) In support of his
6 findings, Dr. Bailey referenced a February 14, 2007, psychological
7 evaluation signed by Frank Rosekrans, Ph.D., in which psychological
8 tests similar to those relied upon by Dr. Pollack were administered
9 and interpreted. (Tr. 414, 263-72, 558.) Dr. Rosekrans found
10 Plaintiff tested average in intellectual functioning and did not
11 have psychological impairments sufficient to keep him from working.
12 (Tr. 268.) Significantly, Dr. Rosekrans noted Plaintiff's reported
13 activities of daily living were "at extreme odd[s]" with the
14 psychological evaluations and his claims were "somewhat exaggerated
15 when compared to [the] exam." (Tr. 414.)

16 It is noted also on review that, with the exception of the two
17 marked limitations rejected by the ALJ, Dr. Pollack rated remaining
18 mental and social functioning categories as having "no limitations"
19 or "mild limitations," ratings that would indicate a non-severe
20 mental impairment. (Tr. 565-66.) The ALJ did not err in rejecting
21 the two, unexplained "marked" ratings that are inconsistent with and
22 unsupported by the rest of the evidence, including the majority of
23 Dr. Pollack's own report. *Tommasetti*, 533 F.3d at 1041 (incongruity
24 in medical source's evaluation is a specific and legitimate reason
25 for rejection of limitations). In addition, as found by the ALJ,
26 the marked limitations are not supported by Plaintiff's VA mental
27 health progress notes regarding his psychiatric hospitalization and
28

1 treatment. (Tr. 316-336.)

2 For example, the record shows Plaintiff was hospitalized on
3 January 10, 2007, when he presented to VA staff requesting help for
4 increasing depression and anxiety symptoms and suicidal ideation.
5 He reported he recently had ridden his horse in the country for
6 hours, "not caring if he became hypothermic." (Tr. 334-36.) During
7 the intake interview, Plaintiff reported multiple stressors:
8 unemployment, expiration of unemployment benefits, caring for his
9 mother who was ill with cancer. (Tr. 336.) Progress notes indicate
10 he received medication and counseling to address his symptoms, and
11 was discharged on January 12, 2007, with a diagnosis of major
12 depressive disorder, recurrent, moderate. (Tr. 289-90.) The
13 treating psychiatrist's discharge report indicates Plaintiff would
14 need continued medication and counseling. (Tr. 290.) Thereafter,
15 progress notes indicated Plaintiff attended counseling, was
16 responding well to medication, reported feeling calmer and less
17 depressed, and caring for his ill mother. He reported no complaints
18 about symptoms, was watching his diet and losing weight. (Tr. 295,
19 395, 485, 487, 491.) The VA records and Dr. Rosekrans'
20 comprehensive psychological evaluation (administered one month after
21 Plaintiff's discharge from the VA hospital) support the ALJ's
22 finding that Dr. Pollack's marked limitations are not supported by
23 other substantial evidence in the record.

24 The resolution of ambiguities and conflicts in the medical
25 record is the sole responsibility of the ALJ. *Andrews*, 53 F.3d at
26 1039. Where, as here, the record supports the ALJ's resolution of
27 ambiguity within Dr. Pollack's psychological evaluation and conflict
28

1 with mental health progress notes and opinions from other acceptable
2 medical sources with specific and legitimate reasoning, the court
3 may not substitute its judgment for that of the Commissioner.

4 **C. Step Four Findings**

5 Citing SSR 83-10, (*Determining Capability To Do Other Work -*
6 *The Medical-Vocational Rules of Appendix 2*),⁴ Plaintiff appears to
7 argue that because the final RFC determination includes limitations
8 inconsistent with the Commissioner's definitions of "medium" or
9 "light" level work, the ALJ and VE should have assumed he could only
10 perform sedentary work, and was, therefore, disabled.⁵ This argument
11 is without merit.

12 As defined in SSR 83-10 and the Regulations, "a full range of
13 medium work requires standing or walking, off and on, for a total of
14 approximately 6 hours in an 8-hour work day. Sitting may occur
15 intermittently during the remaining time." SSR 83-10 (*Glossary*). A
16 full range of light work requires lifting no more than 20 pounds at
17 a time and frequent lifting or carrying objects up to ten pounds.

18 ⁴ *Social Security Ruling* 83-10 provides guidance to the
19 adjudicator at step five, when a claimant has met his step four
20 burden to show his impairments prevent him from performing past
21 work.

22 ⁵ If Plaintiff were found to be limited to sedentary work and
23 unable to perform past work, the ALJ would be obliged to proceed to
24 step five. Using the Medical-Vocational Guidelines as a framework
25 a finding of "disabled" would be directed for an individual of
26 Plaintiff's age and education. 20 C.F.R. Pt. 404, Subpt. P, App. 2,
27 Rules 201.06 and 201.14.
28

1 Light work may require "a good deal of walking or standing," which
2 is the primary difference between sedentary and most light jobs.
3 However, light work may also involve sitting most of the time, with
4 some pushing and pulling of hand or foot controls. *Id.* Sedentary
5 work is limited to jobs involving lifting no more than 10 pounds,
6 and is performed primarily in a seated position. *Id.* The fact that
7 the ALJ's RFC with additional exertional limitations does not fit
8 exactly within the SSR 83-10 definition of "a full range" of medium
9 or light work does not mean Plaintiff is limited to sedentary work
10 or is disabled. Further, Plaintiff's RFC (which is reflected in
11 hypotheticals presented to the VE) significantly exceeds the
12 capacities of sedentary work. See SSR 83-10 (*Glossary*).

13 The Commissioner's regulations address this type of situation
14 specifically. Where it is determined at step four that a claimant's
15 RFC contains components of light and medium work, the ALJ may use
16 the services of a vocational expert to determine if the claimant can
17 do his past relevant work, as actually performed or as generally
18 performed in the national economy. 20 C.F.R. §§ 404.1560(b)(2)),
19 416.960(b)(2); see also *Moore v. Apfel*, 216 F.3d 864, 870-71 (9th
20 Cir. 2000); SSR 83-12 (at step five, vocational expert testimony
21 necessary where RFC falls between two levels). In this case, the
22 ALJ found Plaintiff had the RFC to perform a limited range of medium
23 work with specific limitations in standing, walking and sitting, as
24 assessed by Dr. Rose in August 2008. (Tr. 18, 21, 519-24.) As
25 directed by the Regulations, the ALJ correctly obtained the services
26 of a vocational expert at step four to determine if these
27 limitations precluded Plaintiff's past work at the medium and light
28

1 levels.

2 Based on occupational information in the record, the VE
3 testified Plaintiff's past work in automobile sales consisted of two
4 occupations described in the DICTIONARY OF OCCUPATIONAL TITLES (DICOT):
5 automobile retail sales (classified as light work) and car lot
6 porter (classified as medium work). (Tr. 52.) Considering two
7 hypotheticals presented by the ALJ, the VE found the individuals
8 presented could still perform the medium level job and the light
9 level job, as they were actually performed and as generally
10 performed. (Tr. 21-22, 54-55.)

11 The VE's testimony is consistent with DICOT information
12 regarding the demands of the Plaintiff's past work and, therefore,
13 supported by substantial evidence. *Bray v. Commissioner of Social*
14 *Security Admin.*, 554 F.3d 1219, 1230 n.3 (9th Cir. 2009); DICOT No.
15 273.353-010, 915.687-022; SSR 00-4p. Based on her expertise, the
16 VE testified a hypothetical individual who could lift 20 pounds
17 frequently and up to 50 pounds occasionally, with the capacities for
18 standing, walking and sitting listed above, could perform either of
19 Plaintiff's past jobs as a porter or sales person. (Tr. 54-55.)
20 She indicated an individual restricted to light level work (i.e.,
21 restricted to lifting and carrying with the same work related
22 abilities) could perform the sales job. (*Id.*)

23 Although Plaintiff may not agree with this testimony, he offers
24 no expert testimony or documentation to rebut the vocational
25 specialist testimony, which was necessary and appropriate at step
26 four to determine whether Plaintiff could meet the exertional and
27 non-exertional demands of his previous work. 20 C.F.R. §§

1 404.1560(b)(2)), 416.960(b)(2); *see also Moore*, 216 F.3d at 870-
2 71. The ALJ did not err in relying on the VE opinions in his step
3 four evaluation. Because Plaintiff did not meet his burden at step
4 four, the Commissioner was not obliged to proceed to step five or
5 apply the Medical-Vocational Guidelines. 20 C.F.R. §§ 404.1520(a)(4)
6 and (g), 416.920(a)(4) and (g).

7 **CONCLUSION**

8 The ALJ's findings are supported by substantial evidence and
9 free of legal error. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
12 **DENIED;**

13 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is
14 **GRANTED.**

15 The District Court Executive is directed to file this Order and
16 provide a copy to counsel for Plaintiff and Defendant. Judgment
17 shall be entered for Defendant, and the file shall be **CLOSED**.

18 DATED April 7, 2011.

19
20 S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE